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No. 91-630

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In The

Supreme Court of the United States

October Term, 1991

BRUCE J. RICE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

RICE AIRCRAFT, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO GOVERNMENT'S OPPOSITION

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REASONS FOR GRANTING THE WRIT

I. CONTRARY TO THE GOVERNMENT'S ASSERTIONS, THIS CASE DOES NOT INVOLVE THE "AUTOMATIC REVERSAL" RULE FOLLOWED BY SOME CIRCUITS, BUT CONCERNS AN IMPORTANT INTER-CIRCUIT CONFLICT REGARDING HOW HARMLESS ERROR MAY BE DEMONSTRATED UNDER RULE 11(*h*)

The government's opposition on the Rule 11 issue consists of three main threads: a rehash of the Ninth Circuit's harmless error analysis, the hint that the failure to advise Rice of the maximum imprisonment he faced was not error at all, and the contention that this Court has twice denied certiorari on the issues presented here. We respond briefly to these three points in turn.

The opinion below and the government's opposition both contend that the plea agreement provided Rice with adequate notice of what suspended term of imprisonment he faced. In doing so, they correctly state that any defendant would realize that with probation, "the court would retain some form of coercion, i.e. the possibility of incarceration . . . " Opp. 4. But the crucial question is, how lengthy might that incarceration be? This, Rice was never told.

The government, citing to the panel opinion, contends that the plea agreement provided Rice with this essential information by referring to the statutory maximum, concluding that Rice thereby necessarily knew his suspended sentence could be up to the statutory maximum. Yet, as the Ninth Circuit conceded, Pet. App. 3, the critical question in a Rule 11(e)(1)(C) agreement is not what the statute authorizes, but what the agreement allows. The agreement's mention of the statutory maximum told Rice nothing about what suspended sentence would be permissible under the plea agreement. After all,

the agreement by its terms made clear that the court had to impose less than the statutory maximum. For example, although the agreement recited the statutory maximum of five years for each count, or fifteen years total, all parties agree that Rice could not receive more than five years immediately.

A fair analysis of the agreement is, at the most, that it might have suggested to Rice that he faced fifteen years, but not that Rice *necessarily knew* this from reviewing the document. But since the document is the only evidence that Rice had an understanding beyond the Rule 11 advisement, harmless error could only be found if that document unequivocally informed Rice of the true maximum sentence.

Secondly, the government briefly raises the suggestion that Rice need not have been told how lengthy his suspended term of imprisonment would be. Opp. 6. We submit that the suggestion is clearly incorrect. If a defendant is told that he might receive, for example, five years imprisonment, but ultimately receives probation, then he pled guilty knowing he could receive five years, and can have no complaint if probation is later revoked and the imprisonment imposed. However, if a defendant is wrongly told that his plea agreement allows, for example, only five years imprisonment, but he then receives a ten year term, he can not be said to have known the consequences of his plea, even if part of the imprisonment is suspended and might only be imposed later. So too, Rice, expressly told by the prosecutor that he faced five years imprisonment, was misled into pleading guilty, since he in fact now faces fourteen years imprisonment.

Finally, and most importantly, the government mischaracterizes the issue by suggesting that the inter-circuit conflict we raise involves the "automatic reversal" rule. Opp. 7-8. As our Petition clearly stated, the problem is

not that the Ninth Circuit applied a harmless error analysis, but that the court *misapplied* the harmless error rule. To find that the court's failure to advise Rice properly was harmless error, the panel should have required some direct evidence, through Rice's responses, that he understood the consequences of his plea. Instead, the panel applied its own interpretation of ambiguous language in the plea agreement and then assumed that Rice must have understood the document in the same way. As discussed in detail in our Petition at 14-16, the Ninth Circuit's approach is squarely in conflict with several decisions in other circuits, with the pronouncements of this Court, and with the purposes behind Rule 11(h), as explained in the Advisory Committee Notes.

Thus, the government misstates the issue when contending that certiorari should be denied because the existing conflict in the circuits has not "extend[ed] to providing warnings about the possible effects of probation revocation." Opp. 7. The ongoing conflict among the circuits discussed in our Petition directly implicates this case. That conflict is over how a court may conclude that a defendant knew his true maximum sentence (despite an improper advisement) and thereby treat the error as harmless. Is the court limited to direct evidence, from the defendant's own responses, of the defendant's knowledge? Or may a court instead make assumptions about the defendant's knowledge from a document, with no showing of whether the defendant understood that document at all, or what he understood it to mean?

This case therefore has little to do with the automatic reversal rule of the Fifth Circuit (although Rice might benefit if this Court adopted that rule, since advisement of the maximum sentence is among Rule 11's "core concerns.") This case has everything to do with the intercircuit conflict over what evidence of a defendant's

knowledge must exist to find harmless error. This case also directly implicates another split among the circuits, one discussed in our Petition but not addressed by the government – what standard of proof applies before a court may find harmless error. See Pet. 18-19.

The government is therefore incorrect in asserting that this Court has twice denied certiorari when presented with the same question as in this case, citing to *United States v. Bernal*, 861 F.2d 434 (1988), on reh'g, 871 F.2d 490 (5th Cir.), *cert. denied*, 493 U.S. 872 (1989) and *United States v. Young*, 927 F.2d 1060 (8th Cir.), *cert. denied*, 112 S.Ct. 384 (1991). The question presented in both *Bernal* and *Young* was whether the terms of Rule 11(h) were inconsistent with the Fifth Circuit's rule of "automatic reversal" for a court's failure to address Rule 11's "core concerns." As discussed above, although the "automatic reversal" rule is the subject of a conflict in the circuits regarding Rule 11(h), that conflict is not what provides grounds for certiorari in this case.[1]

The government makes one curious comment which demands a response. It suggests that we cannot show a violation of a substantial right, as required by Rule 11(h), because "nothing in the record suggests that petitioner would not have pleaded guilty if he had known" that he faced fifteen years imprisonment, instead of the five

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[1] To the extent the issue presented here is deemed similar to that in *Bernal* and *Young*, the repeated presentation of the issue to this Court suggests that the need for the conflict to be resolved is a continuing one, and may suggest that this Court now grant certiorari, even if certiorari was previously thought unwarranted. It is also inconsistent for the government to request certiorari in *Bernal* and acquiesce to certiorari in *Young*, but then oppose certiorari in this case.

years the prosecutor stated. Opp. 7. Under the government's test, no Rule 11 violation would ever be cognizable on appeal, because the showing suggested by the government can only be made by supplements to the record, such as in the evidentiary submissions made with a habeas petition. The courts of appeal have always required such a showing when a Rule 11 violation was the subject of a collateral attack, but to our knowledge have never required a defendant to show on direct appeal that had he properly been advised on the maximum sentence, he would have gone to trial. We would ask just how the government believes such a showing could ever be made on direct appeal, other than to assert it in a brief on appeal, which in fact we did (Opening Brief, CA No. 90-30125, p. 12).

In sum, because this case squarely presents a conflict among the circuits over the harmless error analysis to be applied to violations of Rule 11 (a Rule implicated in every guilty plea), this Court should grant certiorari.

II. AS RECOGNIZED BY THE COURT OF APPEALS, THE DISTRICT COURT DID NOT SPECIFICALLY ADDRESS THE MATTERS DISPUTED AT SENTENCING; THIS CASE DIRECTLY TURNS ON THE ISSUES SUBJECT TO CONFLICT WITHIN THE CIRCUITS, INCLUDING THE "SUBSTANTIAL COMPLIANCE" STANDARD RELIED UPON BY THE COURT OF APPEALS AND THE PROPRIETY OF NON-SPECIFIC FINDINGS UNDER RULE 32

The government does not dispute at all the existence of various conflicts among the circuits regarding

application of Rule 32(c)(3)(D).[2] Instead, the government's *sole* basis for opposing certiorari is the contention that the district court specifically resolved each factual dispute brought to its attention. Opp. 9. Since that contention is demonstrably false, the government posits no valid reason for opposing certiorari.[3]

The government makes its assertion only by characterizing the record as to what sentencing matters were in dispute. Notably, not even the court of appeals contended that all disputed matters had been addressed with specificity by the district court. Instead, to uphold the district court, the Ninth Circuit relied upon a non-specific, all-inclusive "finding" made by the district court, the propriety of which is subject to a conflict among the circuits.

To support its position, the government contends that we have identified only three factual disputes unresolved by the district court. Opp. 9. To the contrary, we specified on appeal twelve different disputes which the district

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[2] As discussed in our Petition, the conflicts include a split over whether "strict" or "substantial" compliance with the Rule is necessary, a split which is not merely linguistic but has resulted in widely diverging applications of the Rule. Pet. 25-27. In addition, the circuits have split over the propriety of addressing sentencing disputes in a single, general statement, as opposed to specific findings as to each disputed matter. Pet. 27-29.

[3] Without the entire record, this Court is in an uncomfortable position, faced with the government's contention that all factual disputes were resolved by the district court, and our contention to the contrary. As the ensuing discussion will show, the government's concessions on appeal, combined with the Ninth Circuit's interpretation of the record, make clear that the district court did not make specific findings on each matter, and that the sentencing can only be upheld if the district court's non-specific "findings" of the court were legally sufficient, exactly the issue which warrants certiorari.

court did not address. Opening Brief of Bruce Rice, pp. 32-34, included here at Supp. App. 1-2.[4]

In our Petition for Certiorari, when summarizing the course of the proceedings, we gave this Court a brief overview of the *categories* of disputes presented to the district court. Pet. 6. We specifically stated that these descriptions were simply "for example." The sole purpose of that discussion was to give this Court some understanding of the breadth of the sentencing disputes. It was not to itemize the specific disputes that we contended were unresolved in violation of Rule 32(c)(3)(D). The Petition was not the proper forum for discussing with particularity these specific disputes. If this Court grants certiorari, the Brief on the merits will provide the opportunity for that level of detail.

It is fairly audacious for the government to suggest that we contended there were only three factual disputes unresolved by the court. The appellate record made abundantly clear that there were twelve such disputes,

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[4] The government contends that we presented our factual contentions to the district court "as part of a rambling discourse." Opp. 9. In fact, we provided detailed factual contentions within the lengthy written sentencing submissions. Our opening appellate brief cited specific page references in the sentencing material where the contentions had been made, Supp. App. 1-2; our reply brief on appeal quoted the headings from those pages, showing how specific our contentions had been. Our only arguable failure was in not identifying the specific pages where the presentence report had discussed the issues we disputed. However, as the court of appeals recognized, the district court found our method of presentation acceptable and rejected the government's request for a "chapter and verse" citation to the presentence report.

and the government attempted to discuss all twelve disputes on appeal.[5]

Thus, for example, the question of safety referred to in our statement of facts had several different components. Rice disputed whether parts were improperly replated, whether replated parts were ever tested, the extent to which testing was required, and whether replating must be performed by only certain facilities. Supp. App. 1. The district court did not make specific findings on any of these disputed matters. The court's observation that Rice deprived customers of "safety information," quoted at Opp. 10, does not at all address whether Rice's actions actually caused parts to be unsafe. Yet that was what the government and the presentence report contended and Rice disputed.

The court of appeals never suggested that the district court had resolved each factual dispute through specific findings. Instead, it found that the district court had "substantially complied" with the Rule, and in so finding, it relied heavily on the district court's general statement, finding as facts those listed in the presentence report. Pet.

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[5] On appeal, the government did not contend that the court had specifically addressed all twelve disputed matters. (Government's Brief on Appeal in CA No. 90-30134, as to factual disputes 7, 9, 10, 11, and 12, pp. 17-21; included here at Supp. App. 4-8.) In fact, the government conceded that some of the disputes had not been specifically addressed, Supp. App. 4, and, like the Court of Appeals, relied upon the district court's general "finding." Supp. App. 7-8. The government also claimed that several of the unresolved disputes were "irrelevant," Supp. App. 5, 6, as if that somehow excused the court from complying with its two choices under Rule 32(c)(3)(D), either disclaiming reliance or resolving the dispute.

App. 10.[6] Therefore, the court of appeals decision depends directly on a legal holding as to the sufficiency of such general statements under Rule 32(c)(3)(D), an issue subject to a split among the circuits.[7]

Similarly, the government mischaracterizes the factual issues in dispute as to illegal payments. We presented five different disputes to the district court relating to those payments, including whether the payees were paid to have Rice Aircraft receive extra business, to interfere with competitors' business, or to provide mismatched test reports, and whether payments were made in response to extortionate threats. Supp. App. 1-2. The district court's simple statement that Rice Aircraft obtained an advantage through the payments addressed an undisputed matter. The disputes were over what *specific* advantages Rice Aircraft obtained, and whether the payments were obtained through extortion. These matters were never resolved through specific findings and the court of appeals did not suggest otherwise.

Thus, the government is utterly incorrect in asserting that resolution of the circuit conflict between "strict" and "substantial" compliance would not benefit Rice. The court of appeals directly relied upon the "substantial

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[6] The government contends, Opp. 11 n. 4, that the panel did not decide what level of compliance the Rule requires. But the opinion, with its reliance on a conclusion of "substantial compliance," contains a clear, albeit implied, holding that "substantial compliance" is sufficient to avoid reversal, a holding in conflict with that of several circuits.

[7] The court of appeals was able to rely on the general "finding" only by ignoring that the presentence report set forth the two contrary versions of various facts. That situation left it totally ambiguous which version of the facts the district court was adopting, when it accepted the "facts contained in the presentence report."

compliance" standard in upholding Rice's sentencing, not on the government's belated contention that each dispute was specifically addressed.[8] Pet. App. 10.

In sum, this case squarely poses two significant issues currently causing conflicts among the circuits, conflicts as to a provision invoked in nearly every criminal case. The government has attempted to recast the district court's action into specific findings on each dispute, as opposed to a general "finding," the legality of which is directly implicated by these conflicts. That attempt is belied by the panel opinion. It is belied as well by the government's concessions on appeal. Certiorari should be granted to resolve whether Rule 32(c)(3)(D) requires strict or only substantial compliance to avoid resentencing, including whether the Rule requires specific findings on each disputed matter.

DATED January 16, 1992.

ALAN ZARKY

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[8] The government notes that the Ninth Circuit en banc has required strict compliance, as if that somehow militates against granting certiorari. Opp. 11, n. 4. If the matter were simply that of a panel failing to follow the law of its circuit, certiorari might be unwarranted. But where, as here, there is a sharp conflict among the circuits, with most circuits having addressed the issue, certiorari is not made less appropriate simply because the case presenting the issue involves an intra-circuit conflict as well. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 457 (1967).

SUPPLEMENTAL APPENDIX A

Portions Of Pages 31-33 Of Defendant's Opening Brief On Appeal, CA No. 90-30125

[p. 31] In this case, the presentence report was replete with material which Rice and Rice Aircraft disputed. Among the factual assertions in the presentence report, which assertions were disputed but not addressed by the court's specific findings, were the following (with citation to the page of the presentence report and one "statement or other information" [often one of several places] where Rice disputed the assertion):

1) Whether the company, in replating according to QQ-P-416 rather than HS-322, was improperly replating. Report, p. 7; RT 21, 25, CR 14, pp. 37-38.

[p. 32] 2) Whether the company tested the replated parts. Report, p. 7; RT 21, 39.

3) Whether testing was required for all parts replated by Silverman-Shaw, or only the very few which were rated at over 180,000 pounds per square inch. Report, p. 7; RT 21, 39, CR 23, pp. 4-5.

4) Whether replating can only be performed by an approved source, or instead can be performed by anyone, so long as it is to specification. Report, p. 6; RT 28-29.

5) Whether aerospace customers, as a matter of policy, require traceable parts when ordering high-strength fasteners, or instead whether they sometimes request certifications but often do not. Report, p. 3; RT 36, 45.

6) Whether Bob Lambert was paid to see that the company was on Grumman's bid list more consistently

than its competitors, or instead simply not to interfere with Rice's business. Report, p. 4; CR 14, p. 94.

7) Similarly, whether Bob Lambert was paid to advise buyers not to obtain quotes from Peerless Aerospace. Report, p. 4; CR 14, p. 94.

9) [sic] Whether Votaw supplied Rice with mismatched test reports. Report, p. 4; CR 14, p. 82.

10) Whether Ken Boone provided the company with favorable pricing in exchange for payments. Report, p. 3; CR 10, p. 4 and CR 14, p. 101.

11) Whether Rice made payments to Richard Ohlman (and through him to John Rockwood) to obtain information which allowed the company to adjust a bid to Boeing's Surplus Division, or instead whether he made the payment, after his bid had been [p. 33] accepted, in response to an extortionate threat to hold up the shipment of parts. Report, p. 6; CR 14, p. 98.

12) Whether the parts with which Grumman experienced difficulties had been provided by the company. Report, p. 6; CR 51-54.

13) Whether the offense involved a fraud of between $200,000 and $1,000,000 or instead involved a total of $174,701 ($155,000 in payments, $12,500 in profits from replating and $7,201 from mismatched certifications) (Report, "Estimated Parole Guideline Worksheet; CR 15, ex. p. 2; CR 14, p. 59).

While the court did address some of the disputes Rice had with the presentence report, the court's findings did not resolve any of the disputes listed above.

* * *

SUPPLEMENTAL APPENDIX B

Portions Of Pages 17-21 Of Government's Brief On Appeal, CA No. 90-30134

[p. 17] 7. "Similarly, whether Bob Lambert was paid to advise buyers not to obtain quotes from Peerless Aerospace."

This asserted factual issue was, indeed, not directly addressed by the Court at sentencing, although he dealt thoroughly with the commercial bribes in the passages quoted in section 6, above. Given the Court's findings that the payments were made over a six year period for the purpose of gaining competitive advantage, one is at a loss as to how the Parole Commission might misuse the statement paraphrased in the underlined caption. Indeed, if defendant or his counsel saw a large significance in this statement, it was incumbent upon them to raise the issue with the Court, prior to or at the time of sentencing. The defendant is not entitled to a finding which is more specific than his general opposition to all facts which tend to aggravate the degree of his conduct.

8. Issue 8 was omitted from the Brief served upon the Government.

9. "Whether Votaw supplied Rice with mismatched test reports."

In his Admissions of Plea of Guilty, Rice admitted making secret payments to Votaw which amounted to more that [sic] $22,000 over a four year period (CR 10, p.6). The admitted reason was to obtain "more competitive pricing arrangements." Rice also [p. 18] admitted

paying Ohlman, Boone and Topp of Hi-Shear in order to obtain test reports, and then used those test reports to misrepresent that fasteners being sold were identified and rendered traceable by those reports, which in fact, did not match with the particular parts (CR 10, pp. 3-6).

The Court made the following findings as to the mismatched test reports:

> Mr. Rice has stated in open court, as well as his attorneys, that the company did not falsify reports. They merely took a different report for a different part and attached it to the part that was being sold to the customer. The Court fails to see any significant distinction between those two types of procedures. The delivery of a test report to a customer which the customer is obviously going to rely upon is a falsification. . . . "

(ST 86).

In light of the above findings, it is irrelevant whether the mismatched test reports came from Votaw or Ohlman, Boone and Topp. It is Rice, after all, who must answer for his conduct before the Parole Commission, not Votaw. If Rice or his attorneys see some significance in this statement vis-a-vis Rice, it was incumbent upon them to raise the issue specifically and timeously with the sentencing Court.

10. "Whether Ken Boone provided the company with favorable pricing in exchange for payments."

While Rice admitted making secret payments to Boone and receiving from him test reports, he would

contest the statement in the presentence report [p. 5] that Boone provided Rice with favorable pricing on parts.

[p. 19] Again, inasmuch as it is Rice and not Boone whose sentence is at issue, the relevance of this quibble is not apparent. Rice admitted, after all, making payments to Votaw to obtain "more competitive pricing arrangements" (CR 10, p. 6). But for a brief reference in the Defendants' Sentencing Memorandum [p. 101], the defendant never sought a ruling from the sentencing Court on this specific issue. Nevertheless, the Court did make the following finding with respect to this issue:

> Rice paid Hi-Shear employees Richard Ohlman and Ken Boone over $28,000. These payments Rice has admitted were to obtain manufacturer's test reports. . . .

(ST 90). This finding was consistent with defendants present position on this issue.

11. "Whether Rice made payments to Richard Ohlman . . . in response to an extortionate threat to hold up the shipment of parts."

While defendant does raise this issue at page 98 of his Sentencing Memorandum, he does so in relation to the Government's proffer – not as a contested issue in the presentence report. In connection with the sentencing, the defendant filed 160 pages of pleadings which, together with massive exhibits thereto, weighed some eight pounds. At the sentencing proceeding, he repeatedly declined to make specific objections to the presentence report. Consequently, he is not now in a position to

complain because the Court made a general ruling, finding the facts as set forth in the presentence report "subject to some additional findings I'm going to make during the course of my remarks."

[p. 20] The logical finding is that the Court simply found against the defendant on this issue, particularly in light of the Court's observation that the payments of $155,000 over the period of 1982 to August of 1987 "were made for the purpose of gaining a competitive advantage in the industry," (ST 91-2).

12. "Whether the parts with which Grumman experienced difficulties had been provided by the company."

Once again, defendant complains that the Court failed to make a specific finding as to a factual issue which he did not ask the Court to rule on. While Defendant did, at page 51 of his mammoth Memorandum (CR 14, p. 51-4) contend that Grumman may have confounded his bad parts with another's, at no time did he make the Court aware that he was contesting a statement in the presentence report, nor did he ask the Court to make a specific ruling on the issue. Indeed, when repeatedly asked to make specific objections, he simply failed to do so.

In making the following general finding:

> "I am therefore going to find as facts for purposes of sentencing the facts contained in the presentence report . . . ,"

the Court actually ruled on the Grumman issue. This is so because the Details of Offense section of the report relates that, when Grumman had some trouble with Rice parts, it was determined from Hi-Shear that the parts had been subjected to unauthorized and unacceptable modification. When confronted with the problem, Rice dissembled, stating falsely that the parts had come from Peerless.

In adopting these facts, the Court was amply supported by the evidence. The affidavit of Bernard Beal, a Grumman engineer [p. 21] (CR, Ex. D), established that parts which were causing problems with premature breaking off and locking, were traced to Rice. Special Agent Gordon Strand (CR 16, Ex. J) established that Rice fabricated internal records to falsely reflect that the problem parts had come from Peerless, when, in fact, Peerless did not provide such parts to Rice. The lengths to which Rice went to deceive Grumman as to the origin of the ersatz parts is described in the affidavit of Richard Kennedy, Manager of Quality Procured Material Supplier Control at Grumman (CR 19, Ex. A).

The finding being supported by ample evidence, is not subject to reversal under the clearly erroneous standard which defendant must sustain.

* * *